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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JONATHAN A.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Real Parties in Interest.

No. B224414

(Los Angeles County Super. Ct. No. CK72082)

ORIGINAL PROCEEDING; petition for extraordinary writ. Marilyn Mordetzky, Juvenile Court Referee. Petition granted.

Law Office of Timothy Martella, Eliot Lee Grossman, Rebecca Harkness and Ed Edge for Petitioner.

No appearance by Respondent.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Kim Nemoy, Deputy County Counsel, for Real Party in Interest.

Children's Law Center of Los Angeles, CLC 2 and Martha Matthews for Minor.

Petitioner, Jonathan A., biological father of minor D. A., born November 2007, contends that Referee Marilyn Mordetzky erred in not disqualifying herself, sua sponte; and the juvenile court erred in denying his request for a contested hearing before setting a hearing pursuant to Welfare and Institutions Code section 366.26.[1]

We hold that no basis exists for the disqualification of the referee. However, as Jonathan was entitled to a contested hearing, we grant the petition and order that a contested 24-month hearing be conducted as soon as practicable.

Mother Santana S. is not a party to this petition.

Minor D.A. has joined in the answer of the Department of Children and Family Services (DCFS).

FACTS AND PROCEEDINGS BELOW

On April 2, 2008, alleging that Jonathan had physically assaulted Santana numerous times, the DCFS filed a petition pursuant to section 300 on behalf of minor D.A., and his older brother, Z.S. (who has the same biological mother as D.A., but has a different biological father).[2]

The jurisdictional/disposition hearing was conducted on May 28, 2008. Sustaining the petition, the juvenile court ordered reunification services to Jonathan. Both D.A. and Z.S. were placed with D.A.'s paternal grandparents.

The day before the August 22, 2008 progress hearing, Jonathan made an appointment at a domestic violence counseling program. At the hearing, the DCFS informed the court that neither Jonathan nor Santana had been visiting the minors, and Jonathan had not maintained contact with the DCFS. Jonathan had visited D.A. twice, but had not contacted the children's services worker to arrange for additional visits. Jonathan's visits with D.A. were sporadic.

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[1] Unless otherwise noted, statutory references are to the Welfare and Institutions Code.

[2] Minor Z.S. is not a party to this petition, but he and D.A. have been placed together and are identified as a sibling set.

In September 2008, Jonathan was arrested for physically attacking Santana, who was pregnant with her third child. He was incarcerated at the time of the November 26, 2008 six-month hearing.

The 12-month hearing was conducted on April 22, 2009. Jonathan was incarcerated, with an expected release date sometime in July 2009.

In April 2009, Santana gave birth to Jonathan's biological child K.A., who was born with a positive toxicology screen for marijuana.

After D.A.'s paternal grandparents informed the DCFS that they could no longer care for the minors, both D.A. and Z.S. were placed in foster care.

On July 16, 2009, Jonathan had his first postprison visit with D.A.

Between August 2009 and October 2009, Jonathan failed to appear for five drug tests.

Jonathan was again incarcerated and expected release by March 1, 2010.

Jonathan promised the children's services worker that by March 26, 2010, he would bring documentation to the DCFS to show his compliance with the reunification plan. The report prepared for the April 22, 2010 hearing states: "On 07/21/09, Court ordered father, Jonathan A[.] to do the following:

"1. Parental Education Classes

"2. 52 week Domestic Violence for Offenders

"3. Complete 6 consecutive Drug Test

"The father, Mr. Jonathan A[.] contacted this CSW [children's services worker] on or about 03/2/2010, after being released from jail to schedule to meet with this CSW in order to address father's progress toward court ordered services. This CSW scheduled to meet the father on Friday, 3/12/2010 at the DCFS. However, father failed to show up at the office and then called this CSW the following week stating that he had documentation which demonstrates his participation services. Therefore, this CSW offered to come to father to obtain the documents, however, father declined and stated that he will come to the DCFS office by the end of the week, which would have been on or about 03/26/2010.

However, the father failed to come to the DCFS office and failed to drop off any documentation that would confirm his active participation in case plan services." (Boldface omitted.)

As of the date of the hearing, April 22, 2010, Jonathan had not provided the documents nor contacted the social worker.

By the time of the hearing, over 24 months had passed since D.A. originally had been removed from the physical custody of his biological parents.

Jonathan did not appear personally at the April 22, 2010 hearing. After Jonathan's counsel requested a contested hearing, the following transpired:

"Mr. Edge [counsel for Jonathan]: Your Honor, I would ask to set the matter for contest on behalf of the father. [¶] The report did indicate that he had materials he wanted evaluated regarding his case plan compliance.

"Ms. Ross [counsel for DCFS]: And he never provided that to the worker. Even though they made an appointment after the last hearing, he never showed up after that. She wanted to come and pick up his documents; however, he insisted on bringing them to her, which he never did. [¶] I would ask for an offer of proof. [¶] . . . [¶]

"Ms. Bernard [counsel for minor D.A.]: I'd ask for an offer of proof as well, your Honor. [¶] I'm joining with the Department. [¶] . . . [¶]

"The Court: The court has given every opportunity for these parents to comply. That's why I had indicated and asked Ms. Bernard whether these children were going to be identified as a sibling group, only because we have gone through every measure to try and give the parents every possible opportunity. [¶] So the request for a contest is denied. Certainly on the basis that the parents aren't even present. Not only are they not present, they've shown minimal compliance. They're not even present here in court.

"Mr. Edge: My offer of proof would also extend to reasonable services. [¶] The social workers are supposed to make proactive efforts to contact providers and not just rely on parents to drop letters by. And that would be something I would want to explore in the contest. [¶] . . . [¶]

"Ms. Ross: Your Honor, on February 11 the court found reasonable efforts were made at the .22 hearing. [¶] It has only been two months since the .22 hearing, and there's more reasonable efforts contained in today's report.

"The Court: That request is denied."

DISCUSSION

I

Jonathan contends: "The Juvenile Court should have disqualified itself for bias under CCP 170.1 when it predetermined the issues which should have been the subject of a contested hearing." Jonathan claims that the juvenile court showed that it had "already decided" the issues in denying his request for a contested hearing when it stated at the April 22, 2010 hearing that it had "given every opportunity for these parents to comply" and that both parents had shown "minimal compliance." This contention lacks merit. The referee's remarks did not show any *pre*judgment, but simply constituted the referee's summarization of the record.

Code of Civil Procedure section 170.1 provides: "A judge shall be disqualified if any one or more of the following is true: [¶] . . . [¶] A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. [¶] . . . Bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification." (Code of Civ. Proc., § 170.1, subds. (a), (a)(6)(A)(iii), (a)(6)(B).)

A judge or referee must disqualify herself if "[t]he judge has a personal bias or prejudice concerning a party." (Code of Civ. Proc., § 170.3, subd. (b)(2)(A).) If the judge refuses or fails to do so, "any party may file with the clerk a written verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting the grounds for disqualification of the judge. The statement shall be presented at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification." (Code of Civ. Proc., § 170.3, subd. (c)(1).)

The test for determining whether disqualification is required under Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii), is an objective one, and turns on

whether a reasonable member of the public, aware of all the facts, would fairly entertain doubts concerning the judge's impartiality. (*United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104; see *Flier v. Superior Court* (1994) 23 Cal.App.4th 165, 170.) "While this objective standard clearly indicates the decision on disqualification not be based on the judge's personal view of his own impartiality, it also suggests that the litigants' necessarily partisan views not provide the applicable frame of reference." (*United Farm Workers of America*, at p. 104, fn. omitted.)

Adverse rulings do not support a challenge for cause. "[N]umerous and continuous rulings against a litigant, even when erroneous, form no ground for a charge of bias or prejudice." (*Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 795–796, citing *McEwen v. Occidental Life Ins. Co*. (1916) 172 Cal. 6, 11.) "'Bias and prejudice are never implied and must be established by clear averments.' [Citation.] Indeed, a party's unilateral perception of an appearance of bias cannot be a ground for disqualification unless we are ready to tolerate a system in which disgruntled or dilatory litigants can wreak havoc with the orderly administration of dispute-resolving tribunals." (*Andrews*, at p. 792; accord, *Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 220; *Gill v. Mercy Hospital* (1988) 199 Cal.App.3d 889, 910–911; *American Isuzu Motors, Inc. v. New Motor Vehicle Bd.* (1986) 186 Cal.App.3d 464, 472–473.)

"[A]dverse or erroneous rulings, especially those that are subject to review, do not establish a charge of judicial bias. [Citation.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1112.)

II

Jonathan contends that the juvenile court erred in denying his request for a contested hearing, because: (a) the decision should not have been based on Jonathan's absence from the April 22, 2010 hearing; and (b) Jonathan should not have been required to make an offer of proof.

We hold that Jonathan was entitled to a contested hearing.

The April 22, 2010 hearing was identified as being conducted under both section 366.22 and 366.25.

Section 366.22 provides, in pertinent part:

"(a) When a case has been continued pursuant to paragraph (1) of subdivision (g) of Section 366.21, the permanency review hearing shall occur within 18 months after the date the child was originally removed from the physical custody of his or her parent or legal guardian. The court shall order the return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. The social worker shall have the burden of establishing that detriment. At the permanency review hearing, the court shall consider the criminal history . . . of the parent or legal guardian subsequent to the child's removal, to the extent that the criminal record is substantially related to the welfare of the child or the parent's or legal guardian's ability to exercise custody and control regarding his or her child, provided that the parent or legal guardian agreed to submit fingerprint images to obtain criminal history information as part of the case plan. The failure of the parent or legal guardian to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental. In making its determination, the court shall review and consider the social worker's report and recommendations and the report and recommendations of any child advocate appointed pursuant to Section 356.5; shall consider the efforts or progress, or both, demonstrated by the parent or legal guardian and the extent to which he or she availed himself or herself of services provided, taking into account the particular barriers of an incarcerated or institutionalized parent or legal guardian's access to those court-mandated services and ability to maintain contact with his or her child; and shall make appropriate findings pursuant to subdivision (a) of Section 366. [¶] . . . [¶]

"Unless . . . the child is not returned to a parent or legal guardian at the permanency review hearing, the court shall order that a hearing be held pursuant to Section 366.26 in order to determine whether adoption, . . . guardianship, or long-term foster care is the most appropriate plan for the child. [¶] . . . [¶]

"(b) If the child is not returned to a parent or legal guardian at the permanency review hearing and the court determines by clear and convincing evidence that the best interests of the child would be met by the provision of additional reunification services to a parent or legal guardian who is making significant and consistent progress in a substance abuse treatment program, or a parent recently discharged from incarceration or institutionalization and making significant and consistent progress in establishing a safe home for the child's return, the court may continue the case for up to six months for a subsequent permanency review hearing, provided that the hearing shall occur within 24 months of the date the child was originally taken from the physical custody of his or her parent or legal guardian. The court shall continue the case only if it finds that there is a substantial probability that the child will be returned to the physical custody of his or her parent or legal guardian and safely maintained in the home within the extended period of time or that reasonable services have not been provided to the parent or legal guardian. For the purposes of this section, in order to find a substantial probability that the child will be returned to the physical custody of his or her parent or legal guardian and safely maintained in the home within the extended period of time, the court shall be required to find all of the following:

"(1) That the parent or legal guardian has consistently and regularly contacted and visited with the child.

"(2) That the parent or legal guardian has made significant and consistent progress in the prior 18 months in resolving problems that led to the child's removal from the home.

"(3) The parent or legal guardian has demonstrated the capacity and ability both to complete the objectives of his or her substance abuse treatment plan as evidenced by

reports from a substance abuse provider as applicable, or complete a treatment plan postdischarge from incarceration or institutionalization, and to provide for the child's safety, protection, physical and emotional well-being, and special needs."

Section 366.25 provides, in pertinent part: "(a)(1) When a case has been continued pursuant to subdivision (b) of Section 366.22, the subsequent permanency review hearing shall occur within 24 months after the date the child was originally removed from the physical custody of his or her parent or legal guardian. The court shall order the return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. The social worker shall have the burden of establishing that detriment."

A

Jonathan did not waive his right to a contested hearing by his nonappearance on April 22, 2010.

Jonathan represents in his petition that he had expected that the April 22, 2010 hearing had been set for "merely a receipt of the 24-month Status Review Report with an opportunity for counsel to review the report and either set the matter for a contested hearing, or agree to the recommendation. Jonathan's counsel was present on his behalf, had direction from him, and was authorized to set the matter for contest. There was no reason for Jonathan to sit in court all day merely to have his attorney request the matter be continued to a contest date."

We note that Jonathan had been served with notice that at the April 22, 2010 hearing, the court would be considering the termination of reunification services. We note, also, that the court began the hearing by stating: "The matter is here for a .22 hearing. [¶] . . . The .22 report provided by the Department is to terminate reunification services." At that time, Jonathan's counsel did not object to proceeding without Jonathan, nor did counsel offer any explanation to the court as to why Jonathan

was absent. However, after the court admitted the Status Review Report into evidence, Jonathan's counsel objected "on behalf of the father to the Department's recommendation to terminate his reunification [services] and to my [request for a] contest[ed] hearing being denied."

B

Jonathan did not waive his right to a contested hearing by not making an offer of proof, as none is required.

Counsel for the DCFS and for minor D.A. (but not the juvenile court) requested that Jonathan's counsel make an offer of proof. Jonathan states in the petition that the court did not permit his counsel to provide evidence that Jonathan had complied with the reunification plan or that the DCFS had not made reasonable efforts. As the burden was on the DCFS (§§ 366.22, 366.25), Jonathan was not required to do so. (Cf. *M.T. v. Superior Court* (2009) 178 Cal.App.4th 1170, 1181–1182 [burden on parent posttermination of reunification services].)

In *In re James Q.* (2000) 81 Cal.App.4th 255, 259, the third district determined that a parent could not be required to make an offer of proof in order to participate in a contested hearing. At the "six-month review hearing pursuant to section 366.21, subdivision (e), counsel for appellant [Mother] requested a contested hearing on the issue whether appellant should receive an extended period of reunification services. Counsel asserted appellant was drug-testing regularly, had completed parenting classes, and now had a residence. Counsel also asserted appellant's doctor agreed appellant no longer needed psychotropic medications." (*Ibid.*)

"Counsel for appellant said a contested hearing was necessary in order for the juvenile court to hear appellant's testimony about her contact with the minors. Counsel also asked for cross-examination of the social worker and said it was possible the social worker then might alter her opinion about whether to recommend continued services to appellant.

"The juvenile court said it was 'not satisfied' appellant had 'issues regarding [a] contested hearing.' The parties then discussed appellant's visitation pattern with the minors. . . . [¶] . . . [¶] The juvenile court denied appellant's request for a contested hearing. The court said it had not heard a 'sufficient offer of proof as to evidence that would be presented at the contested proceeding via documentary evidence or testimony by witnesses.' The court then ordered reunification services for appellant terminated but left the previous visitation order in effect." (*In re James Q.*, *supra*, 81 Cal.App.4th at pp. 259–260.)

The third district held: "As a matter of statutory construction and constitutional due process, we conclude the juvenile court cannot require a party to a review hearing to tender an offer of proof as a condition to obtaining a contested hearing. [Citations.] A party must be able to make its best case, untrammeled by evidentiary obstacles arbitrarily imposed by the courts without legislative sanction. [Citation.]" (*In re James Q.*, *supra*, 81 Cal.App.4th at p. 266.)

In *David B. v. Superior Court* (2006) 140 Cal.App.4th 772, 775, the fourth district held that the parent of a dependent child has a due process right to a contested review hearing, "unfettered by the prerequisite of a juvenile court's demand for an offer of proof . . . . Cross-examination is not just the 'Hail Mary pass' of a desperate attorney; it is a recognized method of challenging adverse witnesses, one protected by fundamental notions of due process of law and fundamental fairness. Petitioner is entitled to his day in court."

The fourth district explained: "This case has progressed to the 18-month permanency review hearing. Section 366.22, subdivision (a) provides that if [minor] Susan is not returned to her father [David] after this hearing, the juvenile court *shall* set a section 366.26 permanency hearing unless the court finds by clear and convincing evidence doing so is not in her best interest. This marks a critical turning point in the proceedings from a focus on family reunification to finding a permanent and stable placement for the child. David's best opportunity to make a case for regaining Susan's

custody is now, not after reunification services are terminated and termination of parental rights becomes the preferred placement option. [Citation.]

" . . . Review hearings are an integral part of the constitutional safeguards provided to the parent and child in California's dependency scheme. [Citations.]" (*David B. v. Superior Court, supra,* 140 Cal.App.4th at pp. 778–779; original italics.)

The fourth district concluded: "The risk of an erroneous deprivation of a parent's fundamental interest in his or her child outweighs SSA's interest in an expeditious decision. A contested hearing is the minimal procedural safeguard available, one which is not onerous or unwarranted." (*David B. v. Superior Court, supra*, 140 Cal.App.4th at p. 780.)

The DCFS relies on *Andrea L. v. Superior Court* (1998) 64 Cal.App.4th 1377, 1386, in which division three of our district found that the juvenile court erred in failing to conduct a contested hearing, but that review of the record demonstrated that a contested hearing would not have resulted in a different outcome.

Division three explained: "Here, the social reports before the juvenile court demonstrated mother's relapse into cocaine abuse and her failure to test on other dates around January 15, 1998. These facts were uncontested and mother's counsel did not request an opportunity to cross-examine the author of the reports. Indeed, mother admitted in her statement to the juvenile court that she had made a mistake. Additionally, the juvenile court accepted as true counsel's representation that mother and her counselor would testify mother's relapse had been an isolated incident, the duration and the quality of the relapse had to be considered, mother remained motivated and involved in the Toberman Settlement House program, mother's counselor had confidence in mother's ability to complete the program successfully, and mother's counselor recommended that mother be provided further family reunification services. Although the juvenile court accepted every aspect of mother's offer of proof, it nonetheless concluded the minors could not be returned to mother because her [undisputed] relapse had been too recent.

"Thus, the juvenile court did not mistakenly believe mother's right to a contested hearing previously had been satisfied. Rather, it implicitly conceded mother was entitled to contest the sufficiency of the evidence contained in the social reports and to produce evidence on her own behalf. However, after inquiring what proof mother would adduce at such a hearing, the juvenile court concluded mother's showing would be insufficient to warrant either return of the minors to mother or an extension of family reunification services. Because the juvenile court accepted mother's offer of proof as true, and mother did not seek to cross-examine the author of the social studies before the juvenile court, the present record permits us to determine whether mother was prejudiced by the juvenile court's denial of the request for a contested hearing.

"On this record, we confidently conclude, beyond a reasonable doubt, no different result would have obtained had mother's request for a contested hearing been granted. Accordingly, even under the most stringent test of prejudice applicable to a denial of due process, remand for a contested hearing would constitute an idle act and the juvenile court's error must be seen as harmless beyond a reasonable doubt. [Citations.]" (*Andrea L. v. Superior Court*, *supra*, 64 Cal.App.4th at pp. 1386–1387, fn. omitted.)

Since 1998, when *Andrea L.* was published, the law regarding offer of proof has developed to the point where a parent need not make an offer of proof. Thus, *Andrea L.*,which focuses on the parent's insufficient showing on the offer of proof to determine that a contested hearing was not necessary, is not applicable.

DISPOSITION

The petition is granted. The matter is remanded for a contested 24-month review hearing to be conducted as soon as practicable.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.